Judgment Reserved

IN HE HIGH COURT OF UTTARANCHAL AT NAINITAL

Second Appeal No. 06 of 2000
(Old No. 702 of 1993)

1. Sohan Lal
2. Govind Prasad
   Both sons of Late Sri Shubh Karan
   R/o 38, Adwaita Nand Marg
   Rishikesh, District Dehradun
   ……Plaintiff/Appellants

Versus

1. Hari Mohan
2. Tej Prakash
3. Raj Kumar
4. Chandra Mohan
5. Jitendra Mohan
   All sons of Sri Mehar Chand
6. Rajiv
   adopted son of Sri Mehar Chand
   All R/o Railway Marg
   Near Vaidik Ashram, Rishikesh
   District Dehradun…..Defendants/respondents

Shri C.D. Bahuguna, learned counsel for the appellants.
Shri Sharad Sharma, learned counsel for the respondents

Hon'ble Prafulla C. Pant, J.

This appeal, preferred by plaintiffs under Section 100 for Code of Civil Procedure, 1908, is directed against judgment and decree dated 24.12.1992, passed in Civil Appeal No. 65 of 1986 by the then learned IInd Additional Civil Judge, Dehradun, whereby said appeal, is dismissed, affirming the judgment and decree dated 13.11.1986,

passed by Munsif, Rishikesh in Original Suit No. 231 of 1979 dismissing the same.

2. I heard learned counsel for the parties and perused the record.

3. Brief facts of the case are that plaintiffs/appellants, instituted a suit No. 231 f 1979 before the trial court with the allegations that the plaintiffs are owners and in possession of plot No. 276/49, measuring 2.14 acres, situated in Rishikesh, District Dehradun. It is pleaded by the plaintiffs that they are the bhumidhars of the land and defendants/respondents have no concern, what so ever, with the said land. It is further pleaded in the plaint that on the North of the land in suit, there is land owned by defendants but they want to encroach upon the plaintiffs aforesaid land and for that purpose on 20.08.1979 they have collected boulders and building material over the plaintiffs land. Hence the suit was instituted for injunction, restraining the defendant from interfering in the peaceful possession of the plaintiffs over their land of plot No. 276/49.

4. The defendants contested the suit and filed their written statement in which they have alleged that the land detailed at the end of the plaint, does not belong to plaintiffs. It is further pleaded in the written statement that the land in question actually is part of plot No. 276/6/37, which was purchased by the

defendants through a registered sale deed dated 11.04.1967 from the plaintiffs' father Shri Shubhkaran. It is further pleaded in the written statement that the land in suit is in possession of the defendants and apart from the boulders being collected, there is also defendants' tubewell in said land.

5. The trial court after perusing the pleadings of the parties, framed following issues:-

1. *Whether the land in question lies over plot No. 276/49 or plot No. 276/37?*
2. *to what relief, if any, the plaintiffs are entitled?*
3. *Whether the suit is undervalued and court fee paid is insufficient?*
4. *Whether the court has no jurisdiction to try the suit?*
5. *Whether the suit is not triable by the civil court?*
6. *Whether the suit is within limitation?*

6. After recording the evidence of the parties and hearing them, the trial court found that the plaintiffs have failed to locate the land in question to show that it lies in plot No. 276/49. It observed that the issues on the point of valuation and court fee has already been decided, a preliminary issue. It further observed that on the issue relating to jurisdiction, none of the parties pressed it, as such, he same is decided in

favour of the plaintiff. Lastly, it found that suit is within time. The suit is dismissed by trial court on 13.11.1986 on the ground that the burden was on the plaintiffs to show that land in question was in plot No. 276/49, which they failed, as such, it cannot be said that defendants have encroached upon the land of the plaintiffs. Against said judgment and decree, passed by the trial court, civil appeal No. 65 of 1986 was filed by the plaintiffs before first appellate court. However, after hearing the parties, the same was also dismissed on 24.12.1992. Hence, this Second Appeal was preferred before the Allahabad High Court in May, 1993, where it was admitted on following substantial questions of law:-

1. *Whether the trial court has framed proper issues in the suit under appeal and whether issues framed are sufficient for just decision of the case?*
2. *Whether the presumption arose in favour of the plaintiffs/appellants in view of section 44 and 57 of U.P. Land Revenue Act, 1901?*
3. *Whether the civil court can nullify the effect of revenue entries about existence of plot No. 276/49 on the spot?*
4. *Whether the courts below by not extending benefit of illustration (g) of section 114 of the Indian Evidence Act, 1872, the plaintiffs committed error of law?*
5. *Whether the first appellate court has failed to exercise its power under sub-section (1) of*

clauses (b) and (c) of Section 107 of Code of Civil procedure, 1908?

6. *Whether the plaintiffs/appellants can be relegated to the revenue court by moving under Section 41 of the U.P. Land Revenue Act, 1901 for demarcation, particularly when there is no dispute of boundary of plot in question between the parties?*

This appeal is received by transfer under Section 35 of U.P. Reorganisation Act, 2000, from Allahabad High Court, for its disposal.

7. <u>Answer to substantial question No. 1:-</u>

Shri C.D. Bahuguna, learned counsel for the plaintiffs/appellants argued that the trial court has committed error of law by not framing issues on the point of ownership of plot No. 276/49 in respect of which the plaintiffs have sought the relief. I have gone through the pleadings and perused the record in the light of provisions of Order XIV of Code of Civil Procedure, 1908. From the record of the trial court, it appears that at the time of framing of the issues, the plaintiffs did not press this question before the trial court, as such it can be said that the plaintiffs waived the same. Otherwise also, after going through the entire pleadings of the parties, the issue was not that who is the owner of plot No. 276/49 but the question was whether the land in suit of which boundaries are shown at the foot of the plaint is part of plot No. 276/49, owned by plaintiffs or is it a part of plot No.

276/6/37, purchased by the defendants from the father of the plaintiffs. Therefore, the trial court has committed no error of law by framing issue No. 1 on the point of location of the plot instead of the ownership. Even if the trial court has framed issue of the ownership of the plot No. 276/49, it would not have changed the fate of the suit, as the suit could not have been decreed for injunction against the defendants unless the plaintiffs had successfully proved that the land in question is part of plot No. 276/49 and not of plot No. 276/6/37. Therefore, this substantial question of law is accordingly answered with the observation that the trial court has committed no error of law by not framing the issue on the point of ownership of plot No 276/49.

8. **Answer to substantial questions No. 2 and 3:-**

Section 44 and Section 57 of U.P. Land Revenue Act, 1901, read as under:-

"44. Presumption as to entries in the annual register- *entries in the annual register shall, until contrary is proved, be presumed to be true.*

……

……

57. Presumption as to entries- *All entries in the record of rights prepared in accordance with the provisions of this Chapter shall be presumed to be true until the contrary is proved; and all decisions under this Chapter in cases of dispute shall, subject to the provisions of sub-section (3) of section 40, be*

binding on all Revenue Courts in respect of the subject-matter of such disputes; but no such entry or decision shall affect the right of any person to claim and establish in the Civil Court any interest in land which requires to be recorded in the registers prescribed by Section 32."

From the above provisions of law, it is clear that the entries in the revenue register/record are to be treated true unless otherwise proved. Learned counsel for the appellants argued that when D.W/. 1 Nakli Ram Lekhpal has admitted that there is entry in favour of the plaintiff over plot No. 276/49, the courts below should have treated the same to be true. The argument of learned counsel for the appellants is misconceived. Nowhere courts below have said that the plaintiffs are not the owners of plot No. 276/49. What is in controversy is this that whether the plaintiffs have established that the land in question, details of boundaries of which, are mentioned in the foot of the plaint, lies in the plot No. 276/49 or in plot No. 276/6/37. Even after the benefit of presumption, as per provisions contained in Section 44 and 57 of U.P. Land Revenue Act, 1901, is given to the plaintiffs/appellants, it does not help them, as to the location of the plot and as such does not affect the fate of the suit. Neither the trial court nor the first appellate court has refused to presume truthfulness of the entries in the revenue record. Accordingly, these two substantial questions of law stand answered with the observation that even after giving the benefit of

presumption under Section 44 and 57 of U.P. Land Revenue Act, 1901, the fact that disputed land lies in plot No. 276/49 is not established on record. The courts below (civil courts) had done nothing, which indicates on the record that it amounts nullifying the revenue entries in respect of plot No. 276/49.

9. **Answer to substantial question No. 4:-**

Clause (g) of Indian Evidence Act, 1872, provides that the court may presume that the evidence, which could be and is not produced, if produced, be unfavourable to the person who withholds it. It is contended on behalf of the appellants this principle of law holds good in the present case. It is further contended in this connection that defendant Mehar Chand did not dare to get himself examines as witness. I see no force in the contention of the learned counsel for the plaintiffs/appellants, as, as many as ten witnesses are examined on behalf of the defendants and D.W. 10 is son of defendant Mehar Chand. Apart from this, copies of revenue entries are filed by the parties before the trial court. Since the burden to prove was on the plaintiffs to establish that disputed land in part of plot No. 276/49, as such non examination of Mehar Chand does not affect the defendant case. The plaintiffs/appellants on whom there was burden to prove the plea raised by them in respect of the land in question is in plot No. 276/49, and they could have got the survey commission issued to get the plot located, and did not do so, as such, it

can be presumed that had the plaintiffs issued the survey commission, the plot of which boundaries are detailed at the foot of the plaint would not have been found in said plot. Accordingly, substantial question of law stands answered.

10. **Answer to substantial question No. 5:-**

Section 107 of Code of Civil Procedure, 1908, empowers the appellate court not only to determine a case finally but also to remand a case or take additional issues and refer them for trial. Clause (b) of said Section 107 empowers the appellate court to remand a case and clause (c) empowers the appellate court to frame issues and refer them for trial. But merely for the reason that the appellate court is empowered to do so, does not mean that in each and every case, the appellate court should remand the case to the trial court for fresh decision. If there is no illegality found in the judgment and order of the trial court, it cannot be said that there is any occasion to remand the case for fresh trial. In the present case, the first appellate court did not find any infirmity in the judgment and decree passed by the trial court, which affects fate of suit as such there was neither any occasion for the trial court to remand the case nor was there any reason to frame additional issues, as such there was no question of referring back the case to trial court. Rather, it is an unhealthy practice to remand the case on minor issues or minor infirmities, which are not fatal to the case. Each one who is

associated with the administration of justice including first appellate court, second appellate court and member of the bar engaged in the case, owes duty to the court, to help in speedy disposal of the cases without affecting the quality of justice. With these observations and reasons, the substantial question of law No. 5 stands answered, as it was not the fit case to remand the matter to the trial court or to frame additional issues at the appellate stage.

11. **Answer to substantial question of law No. 6:-**

"***41. Settlement of boundary disputes-*** *(1) All disputes regarding boundaries shall be decided as far as possible on the basis of existing survey maps, but if this is not possible, the boundaries shall be fixed on the basis of actual possession.*

(2) If, in the course of an inquiry into a dispute under this section, the Collector is unable to satisfy himself as to which party is in possession or if it is shown that possession has been obtained by wrongful dispossession of the lawful occupants of the property within a period of three months previous to the commencement of the inquiry, the Collector-

(a) In the first case shall ascertain by summary inquiry who is the person best entitled to the property, and shall put such person in possession;

(b) In the second case, shall put the person so dispossessed in possession; and

shall then fix the boundary accordingly.

After going through the above provision, it is clear that the dispute relating to the land covered under U.P. Land Revenue Act, 1901, are to be determined by the revenue authorities and not by the civil court. However, in the present case the plaintiffs have not sought relief to set right the boundaries of plot in question but have prayed for injunction and pleaded that over their land i.e. No. 276/49, the defendants are making an attempt to raise the construction, which the defendants have denied, alleging that thier construction is going on over his plot No. 276/6/37. As such, the actual dispute involved in the matter is of the location for which the plaintiffs should have got the survey commission issued for location of their plot in this very suit. The procedure before the civil court is not covered by the provisions of Section 41 of U.P. Land Revenue Act, 1901. The said Section provides jurisdiction to entertain the dispute by the revenue authorities, as to the boundaries and to decide the disputes on the basis of the survey maps and if not so, by actual possession. Therefore, first appellate court has committed error of law to that extent in reversing finding of the trial court as to jurisdiction. It is relevant to mention here that the present suit is instituted for simple injunction alleging that defendants are intend to encroach upon the land of

plaintiffs. With these observations, the substantial question of law No. 6, stands answered.

12. For the reasons as discussed above, this Court does not find any illegality or infirmity, which requires interference of this court in the judgments and decree passed by the courts below, (except to the extent observed in preceding para on findings on issue no. 4 and 5). The findings given by the first appellate court on issue No. 4 and 5 are reversed. But the appeal is liable to be dismissed on account of finding on issue No. 1 and 2 of the courts below. The same is dismissed. Costs easy.

(Prafulla C. Pant, J.)

Dt: 30.08.2006
Sweta